IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ARLENE ZLOTNICK LIVING TRUST, by CARL KAISER, TRUSTEE, Plaintiff/Appellee, v. LARRY S. FINMAN and SPECIALNEEDSVEHICLES, INC., Defendants/Appellants.	2 CA-CV 2006-0216 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C 20061409

Honorable John F. Kelly, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 The trial court entered a default judgment in favor of appellee, the Arlene Zlotnick Living Trust, and against appellants Special Needs Vehicles, Inc. and its owner Larry Finman (collectively, "Finman"). On appeal, Finman contends the trial court abused its discretion in denying his motion to set aside the entry of default and default judgment, arguing his failure to answer the complaint was due to excusable neglect, and the trial court, at a minimum, should have conducted a hearing on alter ego and respondeat superior issues as well as the amount of damages. Finding the trial court did not abuse its discretion, we affirm.

BACKGROUND

¶2 On appeal from the denial of a motion to set aside a default judgment, we view the facts "in the strongest light in favor of the appellee[] since the trial court denied appellant's motion." *Beyerle Sand & Gravel, Inc. v. Martinez*, 118 Ariz. 60, 62, 574 P.2d 853, 855 (App. 1977). The Trust filed this action on March 13, 2006, alleging claims for unjust enrichment, conversion, embezzlement, breach of contract, fraud, negligence, "aiding and abetting," breach of fiduciary duty, alter ego, respondeat superior, and declaratory relief. The Trust alleged Finman had agreed to sell a special-needs-modified vehicle on behalf of the Trust. According to the Trust's verified complaint, Finman sold the vehicle for $31,500, but did not pay the Trust "despite numerous demands for payment."

¶3 The Trust served the summons and complaint on Finman on April 5, 2006. The summons stated that a "[r]esponse must be filed within TWENTY DAYS, exclusive of

the date of service." Finman did not file an answer. On May 2, the Trust applied for entry of default. The application stated that a copy had been sent to Finman and that the "default w[ould] be effective . . . 10 days after the filing of th[e] application unless [Finman and SpecialNeeds] plead or otherwise defend prior to the expiration of said 10 days." Finman again failed to respond. On June 8, the Trust moved for entry of judgment by default without a hearing, and on June 13, the trial court entered default judgment in favor of the Trust and against Finman in the amount of $31,500.

¶4 Finman averred below that when he received a copy of the motion for entry of default judgment "[i]n late June," he "began to prepare a response . . . and on June 27 . . . went to the Pima County Superior Courthouse to file [his] response." He then discovered that the June 13 judgment had already been entered and "began to seek legal advice." Thereafter, on July 14, he filed a motion to set aside the entry of default and default judgment. He averred that when he received the summons, which stated a response must be filed within twenty days, he had "understood that to mean that an Answer had to be filed within 20 days of the date of [the complaint's] filing, regardless of the date of service . . . [and had therefore] believed that the deadline for a response . . . had already passed." Apparently on that basis, Finman took no action. He also averred that when he received a copy of the application for default, he again had "believed that the time within which to file a response had already passed" and again failed to act.

¶5 The trial court denied Finman's motion to set aside the entry of default and default judgment, finding that he "ha[d] not shown excusable neglect, and that the judgment [wa]s for a sum certain." Finman moved for reconsideration, and the court denied that motion as well. This appeal followed.[1]

DISCUSSION

¶6 Finman first argues that because "[d]efault judgments are not favored" and because "the trial court's determination . . . should be guided by . . . equitable principles," the trial court should have found excusable neglect in his failure to answer and, therefore, should have set aside the entry of default and default judgment. "Although 'it is a highly desirable legal objective that cases be decided on their merits,' we review the trial court's refusal to set aside a default judgment only for 'a clear abuse of discretion.'" *Hilgeman v. Am. Mortgage Secs., Inc.*, 196 Ariz. 215, ¶ 7, 994 P.2d 1030, 1033 (App. 2000), *quoting Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983); *see also Schering Corp. v. Cotlow*, 94 Ariz. 365, 370, 385 P.2d 234, 238 (1963). And,

> [i]f a court's decision is based upon "a determination of disputed questions of fact or credibility, a balancing of competing interests, pursuit of recognized judicial policy, or any other basis to which we should give deference," we will not

[1]Although Finman appealed before the trial court entered a final, appealable order, we nevertheless have jurisdiction pursuant to A.R.S. § 12-2101(C). *See Barassi v. Matison*, 130 Ariz. 418, 421, 636 P.2d 1200, 1203 (1981); *see also Sullivan & Brugnatelli Advertising Co. v. Century Capital Corp.*, 153 Ariz. 78, 80, 734 P.2d 1034, 1036 (App. 1986).

> second-guess or substitute our judgment for that of the trial court.

Gen. Elec. Capital Corp. v. Osterkamp, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992), *quoting City of Phoenix v. Geyler*, 144 Ariz. 323, 329, 697 P.2d 1073, 1079 (1985).

¶7 Under Rule 55(c), Ariz. R. Civ. P., 16 A.R.S., Pt. 2, a court "may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(c)," Ariz. R. Civ. P., 16 A.R.S., Pt. 2, if good cause is shown. "A party seeking relief from a default judgment must demonstrate to the satisfaction of the trial court (1) that his failure to answer within the time required by law was due to excusable neglect; (2) that he had a meritorious defense; and (3) that he made prompt application for relief." *Beyerle*, 118 Ariz. at 62, 574 P.2d at 855. To establish excusable neglect, "a moving party must show that he acted as a reasonably prudent person under the circumstances." *Sax v. Superior Court*, 147 Ariz. 518, 520, 711 P.2d 657, 659 (App. 1985); *see also State ex rel. Corbin v. Marshall*, 161 Ariz. 429, 431-32, 778 P.2d 1325, 1327-28 (App. 1989) ("The moving party has the burden of demonstrating good cause for vacating the entry of default—that is, grounds such as mistake, inadvertence, excusable neglect and due diligence.").

¶8 Finman argues his failure to respond was due to excusable neglect because he is a "non-attorney" and "misunderstood the deadlines set forth in the Civil Summons . . . and the Application of Default." And he maintains that when he discovered the judgment had been entered, he "acted diligently, attempting to secure legal counsel, promptly filed [a]

Motion to Set Aside the Default and Default Judgment, and timely filed an appeal when that motion was denied."

¶9 The summons, however, stated: "This is a legal document. If you do not understand its consequences, you should seek the advice of an attorney." In accordance with Rule 12(a)(1)(A), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, the summons also clearly stated that "[a] Response must be filed within TWENTY DAYS, exclusive of the date of service." And "ignorance of the rules of procedure is not the type of excuse contemplated in rule 60(c) as ground for vacating a default judgment." *Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984); *see also Marshall*, 161 Ariz. at 432, 778 P.2d at 1328 ("[I]gnorance of our Rules of Civil Procedure . . . is not the type of excuse that demonstrates good cause to vacate entry of default."). In view of these principles, the trial court did not abuse its discretion in finding Finman had failed to show excusable neglect. Thus, "we need not decide whether [Finman] acted promptly and had a substantial and meritorious defense." *Daou*, 139 Ariz. at 361, 678 P.2d at 942; *see also Hirsch*, 136 Ariz. at 309, 666 P.2d at 54.

¶10 We likewise reject Finman's argument that the trial court "err[ed] when it entered Judgment against [him] without conducting a hearing on the allegations of alter ego and *respondeat superior*." According to Finman, "the trial court was required to make specific, evidentiary findings to support a determination that [he] should be personally, individually liable, before entering a judgment against him," and he was therefore entitled to a hearing under Rule 55(b)(2), Ariz. R. Civ. P.

¶11 Rule 55(b)(1)(i) provides:

> When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the Court upon motion of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

But Rule 55(b)(2) provides:

> In all other cases the party entitled to a judgment shall apply to the court therefor . . . . If the party against whom judgment by default is sought has appeared in the action, that party . . . shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when required by law.

¶12 Relying on the provision in Rule 55(b)(2) that a court may conduct a hearing "to establish the truth of any averment by evidence," Finman maintains the trial court should have required "evidence . . . of an indivisible unity of interest between [himself] and SpecialNeedsVehicles, Inc." That provision, however, applies when a "party against whom judgment by default is sought has appeared in the action" and when it is necessary "to enable the court to enter judgment." Ariz. R. Civ. P. 55(b)(2). Finman cites no authority to support his assertion that the rule requires a hearing on any issue other than damages. *See* Ariz. R. Civ. App. P. 13(a)(6), 17B A.R.S. Rather, he relies primarily on principles of

corporate law and *Neis v. Heinsohn/Phoenix, Inc.*, 129 Ariz. 96, 628 P.2d 979 (App. 1981), for the proposition that he is entitled to "litigat[e] . . . the amount of the damages in this case, or the extent, if any, to which alter ego liability should be applied." The court in *Neis*, however, addressed a discretionary award of treble damages under A.R.S. § 23-355, an issue relating to damages, not liability. 129 Ariz. at 101, 628 P.2d at 984. We therefore find misplaced Finman's reliance on that case.

¶13 Indeed, as our supreme court has stated: "All well pleaded facts are admitted by the default. Any failure in the testimony is immaterial. The great weight of authority is that the plaintiff 'is not required, in order to be entitled to a judgment by default, to establish his cause of action by further proof.'" *Postal Benefit Ins. Co. v. Johnson*, 64 Ariz. 25, 33, 165 P.2d 173, 178 (1946), *quoting* 34 C.J. *Judgments* § 408 (citation omitted). The Trust pled in its complaint that "SpecialNeedsVehicles, Inc. is merely a business conduit of . . . Finman and he used the corporate form to shield himself from personal liability" and that "[t]here was . . . [a] unity of interest and ownership between SpecialNeedsVehicles and Finman, as well as an intermingling of corporate and personal assets and affairs." As our supreme court also has recognized, "Rule 55 is a severe remedy. When a default is entered, a defaulted party loses all rights to litigate the merits of the cause of action." *Tarr v. Superior Court*, 142 Ariz. 349, 351, 690 P.2d 68, 70 (1984). The trial court did not err, therefore, in denying Finman's request for a hearing on this issue.

¶14 Again relying on Rule 55(b)(1), Finman lastly contends he was entitled "to have a hearing on the amount of the Judgment," which he asserts "was an unliquidated sum." Arizona law is clear that, "[a]lthough Rule 55(b) . . . seems to speak in discretionary language, the rule is that when the amount of damages is unliquidated it is incumbent upon the court to conduct the hearing to determine the amount of damages." *Mayhew v. McDougall*, 16 Ariz. App. 125, 130, 491 P.2d 848, 853 (1971). The question before us then is whether the Trust's damage claim was for a "sum certain," eligible for a judgment by motion, or instead was "unliquidated," requiring a hearing as Finman asserts.

¶15 A "sum certain" is defined as "[a]ny amount that is fixed, settled, or exact." *Black's Law Dictionary* 1476 (8th ed. 2004); *see also Housing Auth. v. Melvin*, 533 A.2d 1231, 1233 (Conn. App. Ct. 1987) ("A 'sum certain' is merely a term of art for a sum which is 'capable of reduction to certainty.'"), *quoting Anderson v. Bridgeport*, 56 A.2d 650, 653 (Conn. 1947). But "[a] claim is not for a 'sum certain' merely because it is for a specific amount." *Beyerle*, 118 Ariz. at 63, 574 P.2d at 856. "The term 'sum certain' has been held to have a meaning similar to 'liquidated amount.'" *Interstate Food Processing Corp. v. Pellerito Foods, Inc.*, 622 A.2d 1189, 1193 (Me. 1993); *see also* 49 C.J.S. *Judgments* § 221(c) (1997) ("Where . . . plaintiff . . . is entitled to recover a fixed or liquidated amount, . . . defendant's default admits plaintiff's right to recover the sum demanded in the . . . complaint . . . ."). Division One of this court has characterized a claim as liquidated "'if the evidence furnishes data which, if believed, makes it possible to compute the amount with

exactness, without reliance upon opinion or discretion.'" *Ariz. Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 14 Ariz. App. 486, 496, 484 P.2d 639, 649 (1971), *quoting* Charles McCormick, *Damages* § 54 (1935).

¶16 The Trust set forth in its verified complaint the precise amount for which the vehicle at issue had been sold. This case is unlike the situation in *Beyerle*, 118 Ariz. at 62-63, 574 P.2d at 855-56, in which this court held an expert opinion was required on the value of the topsoil the defendant had failed to replace. As the Trust points out, it "did not have to rely on [an expert's estimate of value]; the sale of the vehicle provide[d] an exact, liquidated sum." *See Black's Law Dictionary* 949 (8th ed. 2004) ("liquidated" defined as "an amount or debt . . . settled or determined, esp. by agreement" or "an asset . . . converted into cash"). Indeed, because the vehicle had already been sold, the situation here did not "call on the trier of fact to determine a reasonable price"; therefore, the claim was liquidated or for a "sum certain."[2] *Housing Auth.*, 533 A.2d at 1233.

¶17 Finman maintains, however, that although the Trust alleged in its complaint that he had sold the vehicle for $31,500, "that was not the actual price for which the vehicle was sold." He averred below that "the actual sales price was less than $31,500.00, and portions of the sales price represented taxes and license fees that had to be turned over to

[2]Because the vehicle had been sold before the Trust filed its complaint, in which it alleged a specific sales amount Finman had received, it is immaterial that "the ultimate sales price of the vehicle . . . was clearly not 'certain' when the consignment agreement was made," as Finman argues.

the Motor Vehicles Division of the Arizona Department of Transportation." But, "[w]hen [an] action is for a sum certain the default is an admission not only of the right to recover but of the amount of the damages." *Monte Produce, Inc. v. Delgado*, 126 Ariz. 320, 322, 614 P.2d 862, 864 (App. 1980); *see also Billman v. State of Md. Deposit Ins. Fund Corp*., 585 A.2d 238, 245 (Md. Ct. Spec. App. 1991) ("Where a cause of action is such that the plaintiff is entitled to recover either a fixed or liquidated amount or where the amount of damages is ascertainable by mere calculation, the defendant's default admits his liability for that amount."). Thus, because the Trust's claim was for a liquidated amount, as discussed above, Finman was not entitled to challenge the amount of damages. *See id.* In sum, the trial court did not abuse its discretion in denying Finman's motion to set aside the default judgment and his request for a hearing.

DISPOSITION

¶18 The trial court's order denying Finman's motion to set aside the entry of default and default judgment is affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge